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SUPREME COURT OF THE UNITED STATES

No. ~~267.~~ 247

CHARLES H. HOLDEN, APPELLANT,

vs.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 16, 1876.

Modified

Swayne

SUPREME COURT OF THE UNITED STATES.

No. 267.

CHARLES H. HOLDEN, APPELLANT,

vs.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Bill of complaint.—Filed Nov.* 18, 1874.

In the supreme court of the District of Columbia, Nov. 17th, A. D. 1874.

THE FREEDMAN'S SAVINGS AND TRUST COMpany and Thomas H. Talbot, pl't'fs, *vs.* CHARLES H. HOLDEN, JOHN CHESTER, AND Paul Eaton & Isabella Eaton, infants of tender years, and only surviving heirs at law of Daniel L. Eaton, dec'ased, def'ts.	4021. In equity. Docket 14.

To the supreme court of the District of Columbia, sitting in equity:

Pl't'fs say that the parties pl't'fs and parties defendants are all residents of this city, with the exception of said Talbot, who is a resident of Brookline, State of Massachusetts, and further says:

That on or about the 13th day of October, A. D. 1870, said Holden made his certain negociable note of that date, for the sum of five thousand dollars, payable four years from date, with interest at the rate of ten per cent. per annum, interest payable semi-annually.

2 Said note was drawn payable to the order of one Wheeler, to whom it was delivered by said Holden, who thereafter, on the same day, endorsed & delivered it to said Talbot, receiving therefor the sum of five thousand dollars in cash.

That at the same time said Holden made, executed, and delivered to one George L. Stickney a deed in trust, to secure the payment of said note and interest, of a certain dwelling-house and lot of ground in the city of Washington, designated on the plat of said city as lot letter F, in a subdivision of original lots numbered (18) eighteen and (19) nineteen, in square numbered seven hundred and thirty-two, as will more fully appear by said deed, bearing date October 13th, A. D. 1870, and recorded on the 15th day of October, A. D. 1870, in liber No. 626, folio 446, one of the land records of the county of Washington, a true and certified copy of which deed is hereunto annexed and made a part of this bill of complaint, wherein the premises conveyed and the nature of the trust is fully set forth, to be read as part of this bill of complaint.

That said Eaton, the trustee mentioned in said deed, departed

3 this life on the 13th day of February, A. D. 1873, the trust remaining; but no person in esse is now capable of executing it, save by appointment of this hon. court. That said Eaton left as his lawful heirs, him surviving, two minor children, under fourteen years of age, to whom said premises in terms might descend, subject to said trust.

4. That said Talbot, after becoming the holder & legal owner of said note and the beneficiary of said trust, of which the said Eaton had notice, and accepted and held the same in trust for the use of said Talbot, and who then was, and continued to be to the time of his death, the cashier and actuary of the pl't'fs' bank, said Talbot endorsed and delivered to said bank said note, as his agent to keep the same and collect the interest as it became due, of which the said Holden had notice, and who paid the interest for a time, as it become due, to the bank, where it was credited to the said Talbot. That some time in the year A. D. 1872, about July 24th, said Talbot obtained a loan from said bank for the sum of fifteen hundred dollars, he at the same time agreeing

4 with said bank it might hold and retain the Holden note and the

Eaton trust deed as collateral security for the refundment of said loan. Said first note becoming overdue, a second note was made the 13th July, A. D. 1873, for the same sum, and the first one was taken up.

That the said Holden's note of $5,000 matured on the 13th day of October, A. D. 1874, and there remains due and unpaid of the interest on said note from the 13th day of April, 1873, less seventy-five dollars, which was paid on account of interest being due Oct. 13th, A. D. 1873. That said Talbot's indebtedness to the bank remains unpaid, and the bank is still the holder of the Holden note, as collateral to said Talbot's note, and should be first paid out of the proceeds of said Holden's note, and the surplus will properly belong to said Talbot.

5. That said Holden has become and now is deeply insolvent, and unjustly refuses to pay said note or the interest thereon, and puts your orators at defiance.

6. That the said Holden, on the thirtieth day of September, 1871, conveyed the premises to one John Chester, who is now tenant of the freehold and in actual possession of the premises, taking the
5 rents and profits unto himself, with full notice of the trust anterior created by said Holden, having no other or greater rights than the said Holden before his conveyance in the premises, as will more fully appear from the deed of said Holden to said Chester, a copy of which is made a part of this bill.

Your orators pray that proper process may issue and be served on the parties def'ts to this bill; that a guardian ad litem at a proper time may be appointed for the minor defendants to make answer, and that a trustee may be appointed by this honorable in the room & place of said Stickney, deceased, and that he be directed and required to execute the trust according to its terms, as set forth in said deed of trust, and for such other & further relief as your orators may be entitled in the judgment of the court. And that your honor may require the trustee, on making sale of the premises if default of payment of said note, and all proper costs and charges since accrued, may be brought into
6 court and applied to the payment of said note, and the same may be cancelled, and the sale, if made, may be decreed final.

T. J. D. FULLER,
Solicitor for Pl'ffs.

Filed Nov. 18th, '74.

R. J. MEIGS.

Summons to answer.—Issued Nov. 18, 1874.

Summons.

In the supreme court of the District of Columbia, Nov. 18th, 1874.

THE FREEDMAN'S SAVING & TRUST COMPANY and Thomas H. Talbot, complainant, *against* CHARLES H. HOLDEN ET AL., DEFENDANT. } No. 4021. Equity docket 14.

The President of the United States to Charles H. Holden, John Chester, and Paul Eaton & Isabella Eaton, defendant:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment, and such other

process of contempt as the court shall award. Witness, D. K. Carter, chief justice.

R. J. MEIGS,
Clerk, &c.,
By L. P. WILLIAMS,
Ass't Clerk.

7 *Marshal's return.*

(Endorsed :)
Sum'd all.

A. SHARP,
Marshal.

NOV. 21ST, '74.

Plea of def't.—Filed Feb'y 1, 1875.

In the supreme court of the District of Columbia, sitting in equity.

THE FREEDMAN'S SAVINGS & TRUST COMpany et al.
vs.
CHARLES H. HOLDEN ET AL. } Eq. No. 4021.

The said defendant, Charles H. Holden, comes by William A. Meloy, his solicitor, and by protestation, not confessing or admitting any of the matters and things contained in the bill in this cause, for plea to said bill of complaint says:

Before the filing of said bill, and on or about the day of 1874, in accordance with, and by virtue and permission of the provisions of section seven of the act of Congress approved June 20th, 1874, entitled "An act amending the charter of the Freedman's Savings and Trust Company and for other purposes," the Freedman's Savings & Trust Company, one of the parties plaintiff named in the title to this
8 cause, went into liquidation, and in further pursuance of said act of Congress the trustees of said corporation, deeming it advisable to close up its entire business, selected John A. J. Cresswell, Robert Purvis, and R. H. T. Leipold, three competent men not connected with the previous management of said institution, who were approved by the Secretary of the Treasury, to be commissioners to take charge of the property and effects of the said The Freedman's Savings and Trust Company, and who thereupon accepted such office, functions, and power, executed the bond and took the oath required by the act aforesaid in presence of the Secretary of the Treasury, which bond was by him approved, after which and before filing of the bill in this cause the said John A. J. Cresswell, Robert Purvis, and R. H. T. Leipold filed with the Secretary aforesaid a certified copy of the order appointing them such commissioners, and thereupon, by virtue of the act of Congress aforesaid, and of their selection by said trustees as aforesaid, be-
came & still now are invested with the legal and equitable title,
9 interest, and estate of the said bank in all property, choses in action, securities, &c., of whatsoever name or nature theretofore held or belonging to said company, and are and were at the filing of the said bill the only persons competent to bring suit touching any present or former interest or right of the company aforesaid.

Wherefore the said defendant humbly prays the judgment of this honorable court if he ought to make further answer in the premises.

CHARLES H. HOLDEN.

WM. A. MELOY, *Sol'r.*

DISTRICT OF COLUMBIA, *ss:*

Charles H. Holden, being duly sworn, deposes and says he is the defendant named in the title of the foregoing plea, and that said plea is true in point of fact, as he verily believes.

CHARLES H. HOLDEN.

Sworn to this 30th day of Jan'y, 1875, before me.

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Ass't Clerk.

10 I certify that in my opinion the foregoing plea is well founded in law.

WM. A. MELOY,
Sol'r and of Counsel for Def'd't Holden.

Filed Feb'y 1st, 1875.

R. J. MEIGS.

Demurrer of complainant to def't's plea.—Filed March 19, 1875.

In the supreme court of the District of Columbia, sitting in equity.

THE FREEDMAN'S SAVINGS AND TRUST COMpany & Thos. H. Talbot
vs.
CHARLES H. HOLDEN ET AL. } No. 4021.

And for answer to the several pleas of the def'ts Holden & Chester above pleaded, the pl't'fs demur and say that the matter and things therein alledged are not in law a sufficient answer; and the pl't'fs may well maintain said suit in them corporate, and for want of a sufficient plea pray judgment.

T. J. D. FULLER,
Solicitor for Pl'fts.

Filed March 19, '75.

R. J. MEIGS, *Clerk.*

11 *Demurrer sustained —March* 29, 1875.

FREEDMAN'S S. & T. CO. ET AL.
vs.
CHAS. H. HOLDEN. } 4021. Equity doc. 14.

It is this 29th of March, 1875, ordered that the demurrer to the plea fil'd March 19th, 1875, in open c't, be and hereby is sustained, and leave given to answer on or before the 1st day of next term.
M. 9, p. 138.

12 *Defendant allowed to answer.—April 13th*, 1875.

In supreme court, D. C.

THE FREEDMAN'S SAVINGS & TRUST COMpany et al.
vs.
CHARLES H. HOLDEN ET AL. } Equ. 4021.

The order hereinbefore directed to be entered sustaining the demurrer

to the said defendants' plea in this cause not having been spread upon the minutes of the court until after the commencement of the present term, it is, this 13th day of April, 1875, ordered that the defendants have leave to answer within fifteen days from this date.

By the court:

A. W.

Filed Ap'l 13th, '75.

R. J. MEIGS.

M. 9, p. 157.

Appeal to general term.—Filed April 7, 1875.

In supreme court D. C.

THE FREEDMAN'S SAVINGS AND TRUST COMpany et al. *vs.* CHARLES H. HOLDEN ET AL. } Equ'ty. No.

And now comes the said defendant & prays an appeal to the general term from the order hereinbefore entered sustaining the
13 plaintiff's demurrer, which is allowed, and for security upon such appeal it is ordered that the defendant file his own undertaking, with one surety, to pay all costs & damages arising from such appeal if the order aforesaid be sustained.

By the court:

A. W.

Filed Ap'l 17th, '75.

R. J. MEIGS.

Motion for pro confesso.—Filed

In the supreme court of the District of Columbia, sitting as a court of equity.

FREEDMAN'S SAVINGS & TRUST CO. & ALS. *vs.* JOHN CHESTER ET ALS. } No. 4021.

The pl'ts' move the court for a decree that the pl'ts' bill in this case being taken as pro confesso, for the reason that the d'f'ts have failed to comply with the order of this court made on the 13th day of April, 1875, that the d'f'ts file their answer to pl'ts' bill within fifteen days thereafter, to wit, on the 29th day of April, A. D. 1875, which day has long since elapsed and no answer has been filed.

T. J. D. FULLER,
Sol'r for Pl'f'ts.

14 *Leave to def't to answer.—Filed June 17, 1875.*

On motion of complainants' solicitor for decree pro confesso, it is ordered that defendant have leave until Monday, June 21, 1875, to file answer.

By the court:

A. W.

Filed in open court, June 17th, '75.

R. J. MEIGS, *Clk.*

Defendant's answer.—Filed June 24, 1875.

In the supreme court of the District of Columbia.

THE FREEDMAN'S SAVINGS AND TRUST COMpany et al.
vs.
CHARLES H. HOLDEN ET AL. } Eq. No. 4021.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainants' bill of complaint contained, for answer unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, saith:

1st. He admits the averments of the first paragraph of said bill.

2nd. He admits that at or about the day mentioned in the sec-
15 ond paragraph of said bill he made a promissory note, payable in four years from date, to the order of one Wheeler, for the sum of $5,000, &c., who, in consideration thereof, at the delivery of such note and at sundry times thereafter delivered to him various sums of money, not exceeding in all four thousand dollars, and that he, to secure the payment of such note, also executed & delivered, but not, as averred, to one George L. Stickney, a deed of trust referred to in said bill; but as to the further averments of said paragraph, when, to whom, and for what consideration the said Wheeler endorsed or delivered the said note, this defendant is a stranger, without information sufficient to form a belief whether, &c., and therefore prays strict proof of the same.

3d. He saith he is informed and believes the averments of the 3d paragraph are true.

4th. He says he is a stranger to all and every the matter set forth in the fourth paragraph of said bill, not having information thereof sufficient to form a belief, wherefore he prays that the plaintiff be required to make strict proof of the same, excepting, however, the averment as to the maturity of this defendant's note, which is admitted.

16 5. He admits that he has been for some time greatly embar-'assed financially, but he denies that he unjustly refuses to pay said note, or the interest due thereon equitably & justly, or that he puts the complainants at defiance, and on the contrary he avers that he has reason to believe that he will shortly be able to meet his just obligation on account of said note, and to liquidate the same, provided the parties entitled thereto will accept what may be equitably due on account thereof.

6. He admits the averments of the sixth paragraph of said bill.

7. And further answering he says, if in truth the Freedman's Savings and Trust Company ever acquired any interest, collateral or otherwise, in said note, all such interest was at the filing of said bill, and is now, vested in John A. J. Cresswell, Robert Purvis, and Robert H. T. Leipold, who, in that case, under the act of Congress in such case made and provided, should have been parties plaintiff hereto, instead of said company.

8th. And further answering on information & belief, this de-
17 fendant says the note aforesaid was never at any time the property of the said plaintiff Talbot, nor was he ever authorized to pledge the same as security for the payment of his individual indebtedness.

CHARLES H. HOLDEN.

DISTRICT OF COLUMBIA, *ss:*

Charles H. Holden, being duly sworn, deposes and says: I have read the foregoing answer by me subscribed, and know the contents thereof. The facts therein stated upon my personal knowledge are true, & those therein stated upon information and belief I believe to be true.

CHARLES H. HOLDEN.

Subscribed and sworn to before me this 25th day of June, 1875.

R. J. MEIGS, *Clerk,*
By J. JAY CAMP, *Asst. Clk.*

Filed June 24th, '75.

R. J. MEIGS.

Replication.—Filed June 25, 1875.

In the supreme court of the District of Columbia. In equity.

THOMAS H. TALBOT AND FREEDMAN'S SAVings and Trust Company, pl'tfs,
vs.
CHARLES H. HOLDEN, JOHN CHESTER,
18 and the infant heirs of Daniel F. Eaton,
dec'd.
} No. 4021.

The complainants hereby join issue with the said def'ts Holden, and will hear the cause on bill, answer & exhibits, and on the order to take the bill as confessed against the def't Chester, and on the answer of the heirs of Eaton.

T. J. D. FULLER,
Sol'c't'r for Pl'tfs.

Filed June 25th, '75.

R. J. MEIGS.

Cross-bill.—Filed Aug. 20th, 1875.

In the supreme court, D. C.

THE FREEDMAN'S SAVINGS AND TRUST COMpany et al.
vs.
CHARLES H. HOLDEN ET AL.
} Equity. 4021.

And now comes the said defendant in the cause above entitled, and files this his cross-bill therein, and respectfully shows as follows, to wit:

The consideration of the $5,000 note mentioned and set forth in the bill of complaint herein was an usurious loan of about $4,500, made under the following circumstances: After the note was executed, and also the deed of trust mentioned in said bill, both were placed in the hands of Charles W. Havener, of the firm of C. W. Havener and Co., to
19 be negotiated by him, and in fact no money was raised thereon until a considerable time subsequent to the date of said note; when from time to time the money was advanced in various sums as the necessities of this defendant demanded, not exceeding in the total aggregate, however, the sum of four thousand five hundred dollars; exactly how much this defendant is unable to state; beyond this amount the

said note is usurious and without consideration, as likewise to the extent of the interest accruing by the terms of said note from its date to the day the money was actually loaned thereon.

It is true that for some time past this defendant has been in embar'assed and straitened circumstances, unable promptly to meet his liabilities in equity or in law on said note, and by reason of such loan; but of late he has recovered in a great degree from his temporary financial difficulties, and he has reason to hope, and does hope and expect not long hence to meet and discharge the full measure of his legal and equitable obligations in the premises. He desires to pay the full amount actually advanced and loaned to him as the consideration of said
20 note and all interest accrued thereon not already paid, and he also desires to obtain the release of the real estate mentioned in the bill of complaint herein, and the conveyance of the title thereof to his assigns discharged from all incumbrance by reason of the loan aforesaid, but so it is that the present holders of said note inequitably and unjustly claim and insist upon the payment of the full amount of the face of said note, and interest on $5,000 from the date thereof to the present hour (less certain payments admitted by them), at the rate of 10% per annum, contrary both to equity and to the law of this defendant's contract aforesaid.

This defendant has paid, to the best of his recollection, on account of said loan and the interest thereon the sum of $1,325.00, and he hereby offers to pay within a reasonable day to be fixed by the court whatever sum the court shall ascertain and determine he is equitably bound to pay by reason of the premises in discharge of the incumbrance aforesaid on the real estate mentioned.

And he prays the court that the complainants in the original
21 bill herein may be required to answer this cross-bill under oath; that the amount actually loaned as the consideration of the note aforesaid may be ascertained, and the dates of the several advances on account thereof; that an account may be stated between this defendant and the legal owner of said note, and that the amount equitably due them by reason of the premises may be finally determined. And finally that upon payment thereof by a day to be fixed by the decree of the court the said infant heirs of Daniel L. Eaton, dec'd, may convey and assure the land, tenements, and hereditaments aforesaid to the def'd't John Chester, his heirs or assigns.

C. H. HOLDEN.

WM. A. MELOY, *S'l'r.*

DISTRICT OF COLUMBIA, *ss:*

Charles H. Holden, being duly sworn, says:

I have heard read the foregoing cross bill by me subscribed & know the contents thereof; the facts therein stated on my personal knowledge are true, and those stated on information and belief I believe to be true.

22 C. H. HOLDEN.

Subscribed and sworn to before me this 19th day of August, 1875.

R. J. MEIGS, *Clerk,*
By J. JAY CAMP, *Ass't Clk.*

Filed Aug. 20th, '75.

R. J. MEIGS.

Answer of F. S. & T. Co. to cross bill.—Filed Sept. 27, 1875.

In the supreme court of the District of Columbia, sitting as a court of equity.

CHARLES H. HOLDEN, PL'F'T,
vs.
FREEDMAN'S SAVINGS & TRUST COMPANY, AND Thomas H. Talbot et als., def'ts. } No. 4021.

The answer of the Freedman's Savings & Trust Company, by its commissioner, to the cross bill of Charles H. Holden against the said bank.

First. The records of this company shows no possession of or connection with the $5,000 note of said Holden, mentioned in said cross bill, except as is hereinafter stated. Nor have the present commissioners any personal knowledge of the inception of the note, or the consideration paid for it, other than may be derived from the records of said company.

23 It appears from the records of the bank, that on the 30th of March, 1871, the bank made a loan to said Talbot of $16,700, receiving as collateral security therefor $20,000 of Northern Pacific R. R. bonds and a note of C. H. Holden for $5,000, secured by real estate. The date of this note not given. This loan was fully paid and the transaction closed on the 22d of July, 1871.

Second. It further appears from the records of the bank, that on the 24th day of July, 1872, the company made a loan to Thomas H. Talbot of the sum of $3,500, and received from said Talbot at the time thereof the Holden $5,000 note, and the trust deed secureing the same, as collateral security for the loan of $3,500, made to said Talbot.

Third. On the 23rd day of July, A. D. 1873, it appears from the records of the company, said Talbot paid and took up his $3,500 note by the payment of $2,000, and gave his second note for $1,500, on ninety days' time, and that the said Holden note of $5,000 & the trust deed was retained by the company as collateral security for the payment at maturity of the $1,500 note, which became due on 12th day of

24 October, 1873. The said Talbot's note of $1,500 & accrueing interest is not paid, and remains in the bank overdue. The Holden note & trust deed are now held by the company, as collateral security for the payment of said Talbot's second and last note. This company has no other interest in the Holden note than as holder aforesaid.

Fourth. The records of this bank do not contain any minute or evidence to show to whom the Holden note was first negotiated, or the consideration paid for it, or from whom said Talbot received the said Holden note, or the consideration he paid for it, nor have the commissioners of said bank any knowledge of the same.

Fifth. As to the other matters and things alleged in said cross bill, the said company and the present commission have no knowledge, and having answered fully, so far as they are enabled from the minutes and records of said bank, they pray to be discharged, with their reasonable costs.

ROBERT H. T. LEIPOLD,
Of the Commis'r of the F.'s S. & T. Co.

25 DISTRICT OF COLUMBIA,
Washington City:

On this fifteenth day of Sept., A. D. 1875, personally came Rob't H.

T. Leipold, one of the commissioners of the Freedman's Savings and Trust Company, and made solemn oath that he has read the answer of the said company & the commission of said company, and for and in their behalf says the matters and things stated in said answer are just and true from his best knowledge, information, and belief.

ROB'T H. T. LEIPOLD,
Of the Commissioners F. S. & T. Co.

Sworn to and subscribed before me this 16th day of Sept., 1875.

JOHN H. COOK,
Notary Public.

Filed Sept. 17th, '75.

R. J. MEIGS.

Replication to ans. to cross bill.—Filed Sept. 25, 1875.

In supreme court, D. C.

THOMAS TALBOT ET AL. }
vs. } Equity. 4021.
CHARLES H. HOLDEN. }

The said Holden joins issue also with the said The Freedman's
26 Savings and Trust Co. upon their answer to the cross bill in this cause.

WILLIAM A. MELOY,
Sol'r for Holden.

27 In the supreme court of the District of Columbia.

FREEDMAN'S SAVINGS & TRUST COMPANY AND THOMAS H. TALBOT }
vs. } In Equity. No. 4021. Doc. 14.
CHARLES H. HOLDEN ET AL. }

FOR COMPLAINANTS.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered, that at an examination of witnesses begun and held on the 9th day of July, A. D. 1875, and continued from time to time by adjournment until the 24th day of July, A. D. 1875, when the within depositions were taken, I, T. D. Anderson, an examiner in chancery, did cause to be personally present at my office, No. 456 Louisiana avenue, in the city of Washington, in said District, the within named witnesses, to testify on the part & behalf of complainants, in a certain cause now depending in the supreme court of the District of
28 Columbia, wherein Talbot et al. are the complainants & Charles H. Holden et al. are defendants.

T. D. ANDERSON,
Ex. in Chancery.

JULY 9TH, 1875.

Met pursuant to annexed notice to take testimony for complainants. Present, counsel for both parties.

Whereupon GEORGE W. STICKNEY, a witness of lawful age, a resident

of Washington City, produced, sworn, & examined by & for the complainants, deposes and says as follows, to wit:

Deposition of Geo. W. Stickney.

I have been actuary and assistant actuary of the Freedman's Trust & Savings Company from 1869 to 1874. I knew of General Talbot loaning the money when the Holden note was given—I mean Talbot became the purchaser of the note. I know Talbot was the owner & purchaser of the note at the time the note was given. (I have no knowledge of the note after that until it was given to the Freedman's Trust Company as security for $1,500 from the Freedman's Trust Company to Talbot.)

29 The first note given for the $1,500 was held by the Freedman's Trust Company, from the date it was given up to the date of the note which is now held by the Freedman's Trust Company for the same amount, which was given to renew the first note.

Int. Look at the original and see if they correspond with the copies filed. Copies of the notes are filed and marked T. D. A. and T. D. A. No. 1, respectively.

Ans. They do; I know Thomas H. Talbot & I know his signature. The handwriting on the original note now before me is his. A copy of this note is filed & marked T. D. A.

Int. Do you know C. H. Holden?

Ans. I do.

Int. Do you know his signature?

Ans. I do.

Int. Look at the original note and say whose is the signature annexed thereto.

Ans. The signature to the original note is that of C. H. Holden. I know John B. Wheeler, the payee of said note. The endorsement on the back of said note is in his handwriting.

Int. When you were actuary or assistant actuary of the bank,

30 were you the agent of said Talbot?

Ans. I was to collect the interest on the note.

Int. Did Holden or any other person pay interest?

Ans. Holden paid interest twice—once to October, 1872, and the second time to April 13th, 1873.

Int. Are any of those endorsements on the note in your handwriting?

Ans. The two last endorsements are in my handwriting, and the money paid by C. H. Holden.

Int. Did you inform him who was the owner of the note, or have any conversation with him?

Ans. I told him that General Thomas H. Talbot was the owner of the note.

Mr. Stickney's deposition is continued on page .

Deposition of Howard S. Nyman.

JULY 9TH, '75.

HOWARD S. NYMAN, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by & for the complainants, deposes and says as follows, to wit:

I am employed at present in the office of the commissioners of the Freedman's Savings & Trust Company.

31 Int. As the agent of the bank, and the proper custodian of

them, have you produced before the examiner two notes, copies of which are annexed to the deposition of George W. Stickney?

(Objected to by Mr. Meloy as incompetent and improper. The form of the question being objected to, the question is changed & put in this way:)

Int. Please state what notes you now produce, where they came from, and to whom they belong.

Ans. The first note of Thomas H. Talbot, for $1,500, dated July 11th, 1873, is owned by the Freedman's Savings and Trust Company. The note of C. H. Holden, dated October 13th, 1870, for $5,000, is payable to the order of John B. Wheeler, and is endorsed by him. It belongs to Talbot & is security for his note. I produce them here from the commissioners of the bank & for them. I know the signature of Wheeler—the endorsement is in Wheeler's handwriting—I have seen him write.

Int. Did you ever have any conversation with Holden in regard to the ownership of the note?

Ans. Not that I know of.

Int. Did you receive any of the interest when paid?

Ans. No; I guess not.

32 Int. How long have you known these notes to be in the possession of the bank?

Ans. Since the date of the first note; Mr. Talbot's first note to the bank.

Int. Was that some time prior to the date of the one a copy of which is here filed?

Ans. It was.

Cross-examined by Mr. Meloy:

Int. You speak of your employment with the commissioners of the Freedman's Trust Company; when did you first enter their employ?

Ans. I am not positive whether it was July 11th or July 13th, but it was as soon as they qualified & came there.

Int. In what year?

Ans. 1874.

Int. Who are those commissioners?

Ans. John A. J. Creswell, R. H. T. Leopold, and Robert Purvis.

Int. Did they at that time take possession of these notes which you have produced in evidence?

Ans. They did.

Int. Had you, previous to that, been in the employ of the Freedman's Savings & Trust Company?

Ans. I had.

Int. For how long a time?

33 Ans. A little over four years.

Int. Give the exact date of the commencement of your service with them.

Ans. I am not positive; but I think it was June, 1870.

Int. What was the nature of your duties in the bank?

Ans. I was the loan clerk.

Int. What have been your duties with the commissioners who succeeded the bank?

Ans. Those of loan clerk.

Int. You hold, then, the same position & perform the same duties under the commissioners as under the bank?

Ans. I do.

Int. What relation, if any, have you to these notes which you have produced to-day?

Ans. I am the custodian of them; I have charge of them.

Int. Look at the $5,000 note and state if there is any writing on the face or back made by you.

Ans. There is some writing on the back in lead-pencil which I should say was mine.

Int. Read it to the examiner.

Ans. "Received November 25th, 1872, $250."

34 Int. Can you state when you first saw this note; if so, when?

Ans. I cannot now state, because it was at the date of the first note of T. H. Talbot; I will say at or about the date. I can state after reference to my books.

Int. Did not all notes discounted by the Freedman's Savings & Trust Company, or received by the company as collateral, immediately pass through your hands & be entered upon the books?

Ans. Yes, sir.

Int. Then the entries made by you in those books would show the day when such paper, whether by discount or as collateral, came to the possession of that company, would they not?

Ans. Not in all cases; they might have been held as cash some time before they were turned over to me. It was sometimes customary where parties expected to hold the loan for only a few days for the officers of the bank to hold it as cash. In all other cases than those they were turned over at once.

35 Redirect by Mr. Fuller:

Int. You have been questioned in the cross-examination about pencil endorsements on the note in your handwriting; please explain that; how it was made & what for?

Ans. I think the money was paid to me, but Mr. Stickney acted as agent in the case and I merely endorsed in lead-pencil. I merely made a memorandum for Mr. Stickney of so much money received for him to make the final endorsement which he evidently did in his endorsement of interest paid to October, 1872. (The last portion of the answer giving the witness's opinion is objected to by Mr. Meloy. The witness says:) I am not speaking in regard to the endorsement from memory at all, but on the supposition that the pencil-mark is in my handwriting.

Int. Have you any recollection of who paid the money, the amount of the money paid, apart from what appears by the pencil-mark endorsement?

Ans. No, sir.

Int. Please give the precise copy of the pencil mark endorsement.

Ans. "Received November 25th, 1872, $250."

Adjourned to July 10th, at 9½ a. m.

ANDERSON, *Ex'r.*

36 JULY 10, '75.

Met pursuant to adjournment.

Present, counsel for both parties.

Whereupon JOHN B. WHEELER, a witness of lawful age, a resident of Washington, produced, sworn, & examined by & for the complainants, deposes & says as follows, to wit:

Deposition of Jno. B. Wheeler.

Int. How and where were you employed in October, 1870?

Ans. I was bookkeeper for the firm of C. W. Havener & Co., brokers, 643 Louisiana avenue.

Int. Look at the note now shown you, dated October 13th, 1870, for $5,000; in whose handwriting is the body of the note, who is the maker & who is the payee, if you know?

Ans. The handwriting is that of C. W. Havener; it is signed by C. H. Holden, to my order, & endorsed by me.

Int. What was the note made for, and in what capacity did you act in it?

Ans. The note was made for the purpose of raising money for C. H. Holden, the drawer. My name was placed there as a matter of accom-'odation to make the note negotiable.

37 Int. Did you give or receive any value in any way?

Ans. Not a dollar.

Int. Any money pass through your hands about it?

Ans. I couldn't tell about this particular case. My impression is that no money passed through my hands in this case, for Holden & Havener generally settled money matters between themselves.

Int. To whom was the note delivered after it was endorsed, and who negotiated it?

Ans. It was either delivered to Mr. Havener or Mr. Sherman. Mr. Sherman was the partner. I am unable to say with whom it was negotiated.

Cross-examined by Mr. Meloy:

Int. Did you have anything further to do with this note & the realizing of money upon it than that which you have already stated?

Ans. No. sir; if it was negotiated by Havener I may have entered up the proceeds from some memoranda he gave me.

Int. You have then no specific memory of the transaction, except so far as already spoken of?

Ans. That is all.

Int. Was it customary for you, in the capacity of bookkeeper for that firm, to make cotemporaneous entries upon its books of

38 the sums realized from the negotiation of paper?

Ans. Yes.

Int. In whose possession or control are the books upon which the entries in this case ought to appear?

Ans. The firm of C. W. Havener & Co. was dissolved about 1873. The books remained in Mr. Havener's possession, and he gave up business here about two months ago, and is now travelling in the State of Missouri & some other State as travelling agent for some business in Alexandria, Va.

Int. Where was he located immediately before leaving this city?

Ans. At the same place, 643 La. ave.

Int. Do you know whether any of the books of his business are still there?

Ans. I think not. Everything belonging to him was moved out, & the premises are now occupied by another party.

Int. Do you know whether he left any one as his agent to attend to or settle up his affairs in this city?

Ans. I think not; I think he gave up entirely; "jumped the town," as they say out West.

Int. Are you not aware of the fact that he & his family had their home; and that his family still reside within a very few miles
39 beyond the city limits, on the Baltimore & Ohio Railroad?

Ans. I can merely say that my evidence referred to business affairs. I know that his family have lived at College Station, Maryland.

Int. Are not the family residing there now?

Ans. I don't know.

Int. You have not heard of any removal?

Ans. I have not.

Int. Where is your place of business at present?

Ans. No. 910 Penn. ave., with A. L. Shephard.

JOHN B. WHEELER.

Sworn to and subscribed July 10th, 1875, before me.

T. D. ANDERSON,
Ex. in Ch'ry.

JULY 10TH, '75.

The witness H. S. WYMAN is here recalled and re-examined by Mr. Fuller:

Int. Are you now enabled to state the date of the first note of Talbot to the Freedman's Bank for which the second one was given?

Ans. I am. I find from the books of the bank that it was dated July 23d, 1872.

Int. Was that note, so far as you know, of the same tenor as the second one, with the exception of the date?

(Objected to by Mr. Meloy as incompetent.)

40 Ans. The only difference was in the amount. The first note was for $3,500.

Recross-examination:

Int. Where is the note you have just spoken of?

Ans. I suppose it is in the possession of Mr. Talbot.

Int. How long since you saw it?

Ans. I don't remember of seeing it since the note of July, 1873, was given, but I had it up to the 23rd of that month, which was the date of that transaction.

Int. To whom did you then pass that note of July, 1872?

Ans. I should say to Mr. Talbot.

Int. Are you in doubt about that?

Ans. No. I haven't the least doubt about it, because that was the rule; aside from that, I cannot speak positively.

Int. And yet you undertake to tell the contents of that note, and to say that it was a substantial transcript of the second note; please explain how you can remember the contents of the paper in your hands accurately, and yet cannot tell what you did with it from any memory of the fact?

(Objected to by Mr. Fuller.)

Ans. I speak from the records. I can't remember all the transactions of the bank. I speak from the records in regard to the contents of this note, in regard to the disposal of the note from the custom of the bank.

Int. Where is that record of which you speak?

Ans. On the loan register in my office.

41 Defendants' counsel here gives notice to produce the note & record spoken of, and objects to the foregoing secondary evidence.

The witness says: Of this transaction I have no recollection independent of the records and memoranda of the bank.

HOWARD S. WYMAN.

Sworn to and subscribed before me this 10th day of July, 1875.

T. D. ANDERSON,
Ex. in Ch'ry.

JULY 10TH.

GEORGE W. STICKNEY is here recalled & says:

I am anxious to correct my former testimony. In looking over the memorandum brought by Mr. Wyman from the records of the Freedman's Saving & Trust Company, I am reminded that the first note given by General Talbot was given for $3,500, and that in January, 1873, $2,000 was paid on that note, out of the proceeds of two notes for $1,000 each, which were held by me for collection for General Talbot, and that the note of July, 1873, for $1,500, was given in renewal of the balance due on the $3,500 note.

Defendants' counsel objects to so much of the foregoing as pur-
42 ports to be evidence taken from books and memoranda not produced here.

Int. Are you not enabled to speak from recollection, independent of the books & memoranda of the facts as above stated?

Ans. I am.

Int. State what you know about a pencil-mark of endorsement on the Holden note.

Ans. I had been pressing Mr. Holden to pay the interest due October 13th, 1872, and he came in on the day of this endorsement, November 25th, 1872, and paid part of the interest in cash, and for the balance he gave a note, for what amount I do not now recollect, and I instructed Mr. Wyman to make the endorsement in pencil until the note given for the balance of interest was paid.

The note was afterwards paid, & I made the endorsement of interest paid to October 13th, 1872, as appears on the note.

Int. Does the Holden note show the endorsement upon it of all money that has been paid upon it?

Ans. It does, to the best of my knowledge.

Int. How long have you been the agent of Talbot, and the custodian of the note with the bank?

Ans. Since July, 1872.

43 Int. State whether, as the agent of Talbot, you, from time to time, called upon Holden for the payment of the interest as it became due on the note?

Ans. I did.

Int. How many times?

Ans. I am sure I couldn't tell. I did about once a week after the interest came due until it was paid.

Int. Did you have repeated conversations with him?

Ans. I did.

Int. What excuses, if any, did he make why he didn't pay the interest promptly when it came due?

(Objected to by Mr. Meloy.)

Ans. His excuse was that he didn't have the money.

Int. Did you inform Mr. Holden, or did Holden know from you or others to whom the note belonged?

Ans. He did. I told him on several occasions that I had instructions

from the holder, Gen'l Talbot, from the owner, Gen'l Talbot, to advertise the property securing the note unless the interest was paid at once.

Int. What reply did Holden make when you told him that?

Ans. He said he would pay the interest when he could get the money, which he generally did after awhile up to the time the last
44 interest was paid, April 13th, 1873.

Int. Did you call upon him for interest up to the time the note became due?

Ans. I called upon him repeatedly from the time the next interest became due, October 13th, 1873, until Dr. Chester called upon me & stated that he owned the property. This was about May or June, 1874.

Int. In any of these conversations with Mr. Holden, did he make any question about the note being due, or the amount of it, with you?

Ans. He made none about the amount of it. The note was not due until October, 1874. He never stated but what he had received full value for the note.

Int. In your interview with Mr. Chester, in May or June, 1874, you may state what he said in relation to his purchase of the property securing the $5,000 note of Holden?

(Objected to by Mr. Meloy, and he requires the examiner to certify the case to the court for its instruction before taking of the answer; which is accordingly done.—T. D. ANDERSON, *Ex. in Ch'ry.*)

Int. Please look at the letter now shown you and say if you know in whose handwriting it is?

45 Ans. It is signed by Wm. A. Meloy, and I think it is in his handwriting. It is addressed to Thomas H. Talbot & dated Washington, D. C., July 1st, 1874.

Int. Please annex it to your deposition.

(Counsel for defendants objects to its being annexed to the deposition, or offered, or read in evidence, or referred to, and requires this to be certified to the court before it is done.

The complainants' counsel here states that the witness has no objection to answering the question.

The witness himself says he has no objection to answering the question.

The question is here certified to the court for its opinion in the premises.—T. D. ANDERSON, *Ex. in Ch'ry.*)

Int. Have you had any conversation with Charles H. Holden in relation to whether Wm. A. Meloy was his agent in this matter?

Ans. I have not.

Int. Are you the person who was appointed by the court trustee at one time to sell the property?

(Objected to by Mr. Meloy.)

Ans. I am.

46 Adjourned to July 14th, '75 at 10 a. m.

ANDERSON, *Ex'r.*

JULY 14TH, '75.—10 a. m.

Met pursuant to adjournment.

Present, counsel for both parties.

No witness appearing, adjourned to 9½ o'clock a. m., July 15, 1875.

ANDERSON, *Ex'r.*

In supreme court D. C.

THOMAS H. TALBOT ET AL.
vs.
CHARLES H. HOLDEN ET AL. } Eq. No. 4021.

This cause coming on to be heard on the certificate of the examiner relative to certain interrogatories proposed by plaintiffs' counsel, and Mr. Fuller having been heard for the plff's, and Mr. Meloy for the defendant Holden, ordered this 13th day of July, 1875, that the examiner shall not take the answer of the witness to the question relative to the conversations of the defendant Chester, and that, as to the letter offered in evidence (the said plaintiffs' counsel stating to the court that he will prove that the writer thereof was, at its date, the agent of
47 said Holden), he proceed to take the evidence under the objection of def'ts' counsel, and without prejudice to any objection or motion he may make thereon.

By the court.

(Endorsed:) M. 9, p. 297. Filed Jul. 13th. '75. R. J. Meigs.

JULY 15TH, '75.

Met pursuant to agreement of counsel, and proceeded to take testimony under the (attached) instructions of the court.

Present, counsel for both parties.

Whereupon the examination of the witness, GEORGE W. STICKNEY, is here resumed.

Please annex the letter referred to heretofore to your deposition.

(Objected to by Mr. Meloy as irrelevant, incompetent, and out of the order of proof. The letter is annexed and marked T. D. A., No. 10.)

Int. Call to mind whether or not you want to correct your former answer in relation to conversations with Holden.

48 Ans. There are several things in the testimony I want to correct after reading it over.

Int. Please look at and read the paper offered, and marked T. D. A., No. 11, purporting to be a certified copy of a deed by the register of deeds, from Charles H. Holden to William A. Meloy.

(Objected to by Mr. Meloy.)

Ans. I have now read the paper.

Int. Will you please annex it to your deposition?

The paper is filed.

(The filing of this paper is objected to by Mr. Meloy.)

Int. Please state whether, after November, 1873, as the agent of Thomas H. Talbot, or the Freedman's Savings & Trust Company, you called upon Charles H. Holden, or had any conversation with him in relation to the payment of the principal or interest of his note of $5,000, dated October, 1870, then held by the bank, and state, if anything, what it was.

Ans. I had several conversations with Mr. Holden after the date mentioned, November, 1873, in relation to the payment of the interest on his note for $5,000, dated October, 1870, and he repeatedly promised to pay it, until some time after Mr. Chester called on me in April or May, 1874, I think, and I called Holden's attention to the fact that Mr. Chester claimed to have bought the property clear of all encumbrances
49 whatever, and he (Holden) said that when he deeded the property to secure the Talbot ($5,000) note, he thought he was deeding a lot lettered the same, but in another square, and that he had

deeded to Wm. A. Meloy his equity in certain property of sufficient value, as he thought, to indemnify Mr. Chester, and that Mr. Meloy was his attorney in his suit against Henry S. Davis to collect whatever interest he had in the property deeded.

(Objected to by Mr. Meloy.)

Int. Please state the time of that conversation as near as you can.

Ans. It was in April or May, 1874, I think.

Int. Did you have any conversation at or about that time or before October, 1874, with Mr. Meloy on the subject of the payment of the note?

(Objected to by Mr. Meloy.)

Ans. I did.

Int. After you had the conversation with Holden?

(Objected to by Mr. Meloy.)

Ans. Yes; I think it was.

Int. Did or not, in the above conversation with Holden, Holden say anything about the agency of Mr. Meloy; and if he did, what did he say?

(Objected to by Mr. Meloy for form & irrelevancy.)

Ans. He stated that he deeded Mr. Meloy the property, as
50 stated in my former answer, and that Mr. Meloy was his attorney to collect whatever might be due from Mr. Davis, the proceeds to be applied to indemnify Mr. Chester.

Int. Did he, Holden, or not say anything whether he should make any further efforts to pay the $5,000 note himself?

Ans. I have no recollection as to that.

Adjourned to July 22d, '75, at 10 a. m.

ANDERSON, *Ex'r.*

JULY 22D, '75—10 a. m.

Met pursuant to adjournment.

Present, counsel for both parties.

Whereupon the witness (GEORGE W. STICKNEY) is cross-examined:

Int. In your examination-in-chief you say "I knew of Gen'l Talbot's having the money when the Holden note was given." State how you knew it, and particularly from whom you received the information.

Ans. The transaction was made at the Freedman's Bank by Col. D. L. Eaton, & I was there at the time.

Int. Who else was present at that transaction?

Ans. One of the firm of C. W. Havener & Co.; either Mr Sherman or Mr. Havener; I am not sure which.

51 Int. Have you named all who were present?

Ans. All that I remember.

Int. Mr. Talbot, then, was not present?

Ans. He may have been there; I couldn't swear positively whether he was or not; sometimes he was present when these loans were made, and at other times the loans had been approved by him, and the transaction was closed by Col. Eaton.

Int. Was there more than one such interview at which the member of the firm of Havener & Co., to whom you have referred, presented the note in question?

Ans. The application, I think, was made by them. Very likely there were several interviews before it was closed up; how many I couldn't say.

Int. You say "very likely." Do you mean by that that such was the usual course of business in like cases?

Ans. I mean the loan could not generally be made and closed up at one interview.

Int. You have, then, no special memory of the incidents attending this transaction?

Ans. I have not.

Int. Did it take place in a room occupied jointly by you and Col. Eaton; if not, where did it?

52 Ans. It took place in a room occupied jointly by us.

Int. What was your business and duty at that time?

Ans. I was assistant actuary of the Freedman's Savings and Trust Company.

Int. Occupying a desk there in that capacity?

Ans. I was.

Int. This loan, then, was conducted by Col. Eaton, was it not?

Ans. It was.

Int. Were you specially called upon to take any part in the transaction?

Ans. I think not.

Int. Can you state more in detail, and more explicably than you already have, what was said and done by either of these parties?

Ans. I cannot.

Int. In what form was the consideration for this note passed?

Ans. My remembrance is that there was a prior trust of $4,000, which was paid off, and the balance paid in cash; this is my remembrance; Col. Eaton's desk & mine faced each other, & I generally knew what was going on if I was not particularly engaged in the transaction.

Int. Do you wish it understood that you swear positively that

53 you, in this instance, saw this money paid over, or a former encumbrance of $4,000 paid off in your presence, and that you distinctly recollect these facts?

Ans. My answer to a former question was that this was my remembrance; but I couldn't swear to it positively.

Int. Is that all the answer you have to make to my last question?

Ans. It is, as I think this answers the question fully.

Int. Have you now stated in full all you know respecting the loaning of this money for the Holden note, and the means of your knowledge respecting its ownership and purchase?

Ans. I have stated all I remember at the present time.

Int. How long after that time was it that you became the agent of Talbot to collect the interest on this note?

Ans. In October, 1872, when it was due, or when the October (1872) interest was due.

Int. Where was the note lying at that time?

Ans. At the Freedman's Bank.

Int. You found it then already in the possession of that bank?

Ans. I found it there as collateral for a loan to Thos. H. Talbot for $3,500.

54 Int. When interest became due upon notes deposited with that bank was it not the custom to send to the maker of that note some few days in advance a memorandum slip or notice that his note was lying in the bank, and that such an amount of interest matured thereon on a specefied day?

Ans It was.

Int. Parties paying interest upon such notification would, in the regular course of business, thereupon pay such interest to the receiving teller of the bank, would they not?

Ans. Sometimes they did & sometimes they paid it to me.

Int. Have you any recollection in respect to this case, in which way the interest maturing October, 1872, was paid?

Ans. My remembrance is that it was paid to myself.

Int. Do you remember in what manner the interest maturing October, 1873, was paid?

Ans. All the interest that was ever paid on that note was paid to myself, as I always had to make some arrangement with Holden in order to get the interest paid.

Int. Since, then, you first had knowledge of this note, it has remained on deposit with this bank until the present time?

Ans. I first had knowledge of the note when it was made. It
55 has been on deposit with the bank since July, 1872, and I suppose it is there at the present time. I have no personal knowledge whether it is or not, though.

Int. Have you any personal knowledge of its whereabouts at any time further than what you have stated?

Ans. It was in my custody for safe-keeping in the safe of the Freedman's Bank from the time the note was made up to the time when the loan of $3,500 was made.

Int. Then the interest of April and October, 1871, was also paid at the bank, in April and October?

Ans. It was paid to Col. Eaton at the bank, & *and* these endorsements are in his handwriting.

Int. Let me call your attention to these endorsements, and I ask you if there was not subsequent to the last of those endorsements a partial payment of interest accrued made by Holden?

Ans. To the best of my knowledge there was not after October, 1873.

Int. Subsequent to the last endorsement upon the note, was there not a partial payment of accrued interest made which is not thereon endorsed?

My remembrance is, there was not. I have no distinct memory
56 about it; $75 has been paid on account of interest accruing upon the note subsequent to April 13th, 1873.

Int. Previous to the advertisement of the sale of the property by you as trustee, did you not have one or more letters from Mr. Talbot, urging and directing you to advertise, in one of which he explained his urgency by saying that it was on account of the need of another person, or something to that effect?

(Objected to by Mr. Fuller on the ground that the question calls for statements of writings without notice to produce, and generally because it is parole evidence as to contents of written documents.)

Defendant Holden's counsel hereupon notifies the witness and the plaintiff's counsel that he requires the production of any letter addressed by said Talbot to said witness in which he makes any statement with regard to the source from which the money invested in the note in question was originally derived, wholly or in part, or by whom the same was owned or for whom he was acting; defendant's counsel also says he does not desire the answer under the objection of the complainants' counsel, but prefers the production of the letter itself.

57 (The complainants counsel here desires the witness to answer the question.)

Ans. I had several letters from Gen. Talbot requesting me to advertise the property for sale, in one of which he stated that as executor of the estate for a lady he required some of the money to pay for necessary

expenses, and that the lady at the time of her death had part interest in this note.

Counsel for defendant here requests the examiner to notify the witness to search for and produce if possible before the examiner the letter referred to by him, and also any letter of the said Talbot in which he refers to the ownership of the note or of the funds by which the same was purchased. Mr. Fuller, complainants' counsel, here announces that his examination in chief is concluded.

Adjourned to July 23d, '75, at 10 a. m.

ANDERSON, *Ex'r.*

JULY, 23D, '75—10 a. m.

Met pursuant to adjournment.

Present Mr. Meloy, defendant Holden's counsel.

The witness (Stickney) desiring more time to search for papers called for by Mr. Meloy, adjourned to July 24th, '75, 10 a. m.

ANDERSON, *Ex'r.*

JULY 24TH, '75—10 a. m.

Met pursuant to adjournment·

58 Present Mr. Fuller, complainants' counsel.

The witness (Geo. W. STICKNEY) is recalled and says:

Since the last adjournment I have made diligent search for the letters called for by Mr. Meloy, and am unable to find them. I say on page 29, "$75 has been paid on account of interest accruing upon the note subsequent to April 13th, 1873." I mean by this that this was admitted by complainant's counsel in my presence. On page 1, I say, "I have no knowledge of the note after that until it was," &c. I wish to say that the note, from the day it was given up to July, 1872, was in my custody, in the safe of the bank.

GEO. W. STICKNEY.

Sworn to and subscribed before me this 24th day of July, 1875.

T. D. ANDERSON,
Ex. in Ch'ry.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, T. D. Anderson, examiner in chancery, do hereby certify that in pursuance of notice the foregoing depositions were taken down by me, &

59 by me reduced to writing in the presence of & from the statements of the witnesses at the time & place designated in the caption thereof, and were then and there by me read over to the witnesses and by them signed in my presence; the witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the said parties to said cause, or in any manner interested therein.

T. D. ANDERSON,
Ex. in Ch'ry.

In the supreme court of the District of Columbia.

FREEDMAN'S SAVINGS & TRUST COMPANY ET AL. *vs.* HOLDEN ET AL. } In eq. No. 4021. Doc.

Stickney's cross-examination.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses begun and held on the 3d day of August, A. D. 1875, when the within depositions
60 were taken, I, T. D. Anderson, an examiner in chancery, did cause to be personally present at my office, No. 456 Louisiana avenue, in the city of Washington, in said District, the within-named witness, to testify on the part and behalf of the complainants in a certain cause now depending in the supreme court of the District of Columbia, wherein Freedman's Bank et al. are complainants and Holden et al. are the defendants.

AUGUST 3RD, '75.

Met for the further cross-examination of the last witness (George W. Stickney) by consent of counsel.

Present, Mr. Wm. A. Meloy, defendant's counsel.

Whereupon Geo. W. Stickney, being cross-examined, says:

I have made thorough search for the letters desired, and which I have been notified to produce, and cannot find them among my papers. I had them at the office of the Freedman's Savings & Trust Company, and may have left them there with the bank papers. In that case they would naturally have been filed among the miscellaneous papers
61 of the bank. I have requested Mr. Leipold, one of the commissioners, to have search made for any letters of Mr. Talbot in 1874, and learn from him that the search was made by Mr. Jones and no letters found. I think I may have destroyed them. The letter of Mr. Talbot to which Mr. Meloy refers did state that a part of the Holden note belonged to his, Gen. Talbot's, sister-in-law. It was not the whole, but only a part of the $5,000; for besides her interest one Mary Powers owns one or two hundred dollars in the note, if it is ever paid.

GEO. W. STICKNEY.

Sworn to & subscribed before me this 4th day of August, 1875.

T. D. ANDERSON,
Ex. in Ch'ry.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, T. D. Anderson, examiner in chancery, do hereby certify that in pursuance of agreement of counsel, the foregoing deposition was taken down, and by me reduced to writing in the presence and from the statement of the witness at the time & place designated in the caption thereof, and was then and there read over to the witness, & by him sub-
62 scribed in my presence, the witness having been by me first duly sworn to tell the truth, the whole truth, & nothing but the truth touching the matter at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. D. ANDERSON,
Ex. in Ch'ry.

Motion to strike cause from calendar.—Filed 16th Oct., 1875.

In the supreme court of the District of Columbia, the 16th day of October, 1875.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY et al. *vs.* CHARLES H. HOLDEN ET AL. } Eq. 4021.

And now comes the said defendant, by his counsel, William A. Meloy, and moves the court to strike this cause from the trial docket, because—

1st. The same was prematurely put thereon before the taking of the testimony was concluded or closed according to the rules of court in such case made & provided.

2d. The time for taking testimony upon the issue joined, Sept. 25, 1875, upon the cross-bill, filed in said cause, has not expired,
63 and the defendant is entitled to have hearing upon such issue at the same time with the hearing of the original cause.

WM. A. MELOY,
Sol'r for Defendant.

Affidavit of Wm. A. Meloy.

DISTRICT OF COLUMBIA, *ss:*

William A. Meloy, being duly sworn, deposes and says he is the solicitor for the defendant Holden in the cause above entitled. At the last session before the examiner, at which complainants' counsel took evidence on behalf of complainants in the presence of defendant's solicitor, one Geo. W. Stickney was under deponent's cross-examination at the time of the adjournment of such session; on the adjourned day deponent attended at the time and place designated, but neither witness nor opposite counsel were present. Deponent therefore asked the examiner to set a certain other day and hour, and went away supposing it was so ordered; at that time he went to the place appointed, but found the office locked and no one there; some time after deponent
64 learned that an another day complainants' counsel had caused the witness to attend, conclude, and sign his evidence, which deponent has not since seen, and thereupon had the same forthwith returned into court.

Whereupon, at the next term of the court, after learning these facts, deponent filed a motion to suppress certain portions of the evidence so taken, and in good faith, supposing he was entitled to have the question thus raised passed upon before taking evidence in rebuttal of such parts of complainants' testimony, deponent did not & has not taken the evidence which he desires and verily believes to be material.

WM. A. MELOY.

Sworn to this 16th day of October, 1875, before me.

R. J. MEIGS, *Clk*,
By R. J. MEIGS, JR., *Ass't.*

M. 10, p. 115.

65 *Motion to strike cause from calendar overruled, Oct. 18th, 1875.*

THE F. S. & T. CO. ET AL.
vs.
CHAS. H. HOLDEN ET AL. } 4021. Equity doc. 14.

It is ordered, this 18th of October, 1875, that the motion of def'd't to strike the above cause from the trial calendar be and hereby is overruled.

M. 10, f. 115.

Decree of special term, Nov. 4th, 1875.

In the supreme court of the District of Columbia, sitting in equity.

THE FREEDMAN'S SAVINGS AND TRUST COMpany & Thos. H. Talbot, pl'ffs,
vs.
66 CHARLES H. HOLDEN, JOHN CHESTER, heirs of Daniel F. Eaton, d'f'ts. } No. 4021.

This cause coming on for hearing on bill and answer, cross-bill and answer, and the proofs & exhibits in the case, together with the motion of the counsel of def't Holden for suppression of certain exhibits & evidence, after argument & consideration by the court, it is ordered, adjudged, and decreed, this fourth day of November, 1875, that the motion of the def't for the suppression of certain evidence specified in said motion is granted & allowed.

It is further ordered, adjudged, and decreed by the court, that the defendant Holden is indebted to Thomas H. Talbot in the sum of five thousand dollars, with interest thereon at ten per cent. per annum, as shown by his promissory note dated Oct. 13th, A. D. 1870, with interest from the 13th day of April, A. D. 1873, less the sum of ($75) seventy-five dollars, paid on account of accrued interest after said note of April 13th, 1875, & that the Freedman's Trust & Savings Company
67 have a lien on the same debt for the sum of fifteen hundred dollars & accruing interest from April 13th, 1875.

It further appearing to the court that the said Holden had by deed to Daniel L. Eaton in trust secured the payment of said note & interest on the property described in said bill & exhibit thereto attached, that said Eaton departed this life on the 13th day of February, A. D. 1873, leaving said trust unexecuted. It is therefore ordered, adjudged, and decreed, that Thomas J. D. Fuller be & hereby is appointed trustee to execute the trust, as set forth in said deed, in the room & stead of said Eaton, deceased, and that in default of payment of said note & interest, and the legal taxable costs of this suit & other necessary expenses and commission, if necessarily incurred, as specified in said deed of trust, the said trustee to advertise & sell, in the manner pointed out in said deed of trust, said tract of land, being a certain dwelling-house & lot of ground in the city of Washington, designated on the plat of said city as lot letter F, in a subdivision of original lots eighteen
68 and nineteen, in square numbered seven hundred & thirty-two, as will more fully appear from said deed, bearing date October 13th, A. D. 1870, and recorded in liber No. 626, folio 446, in the land records of the county of Washington, D. C.

It is further ordered, adjudged, & decreed that in the event of the

sale of said property by said trustee for the non-payment of said note & interest, and other necessary & lawful charges, including costs of the suit, said trustee make report of his doings to this court for the confirmation of the same.

It is further ordered, adjudged, and decreed that the pl't'fs have and recover from the def'ts the cost of this suit, taxed at $.

By the court.

A. WYLIE.

Filed Nov. 4th, '75.

R. J. MEIGS.

M. 10, p. 150.

Appeal to gen. term by Def't Holden.

THE FREEDMAN'S SAVINGS & TRUST COMPANY et al. *vs.* CHARLES H. HOLDEN ET AL. } Eq. No. 4021.

The clerk will enter appeal in this cause to the general term,
69 on behalf of the defendant Holden.

WILLIAM A. MELOY,
Solicitor for Def'd't.

O. B. 5, f. 197.

Decree in general term, June 12, 1876.

In the supreme court of the District of Columbia, sitting in gen'l term.

FREEDMAN'S SAVINGS AND TRUST COMPANY et al. *vs.* CHARLES H. HOLDEN. } 4021. Eq. doc. 14.

This cause coming on to be heard upon the appeal therein from the decree of the special term of November 4th, 1875, and having been duly considered, it is this 12th day of June, 1876, adjudged and decreed that the same be and hereby is affirmed.

Appeal to S. C. U. S.

And from this the defendant, Charles Holden, in open court, now here prays and is allowed an appeal to the Supreme Court of the United States.

By order of the court.

2 M. G. T., f. 560.

70 In the supreme court of the District of Columbia, the 1st day of August, 1876.

THE FREEDMAN'S SAVINGS AND TRUST CO. ET al. *vs.* CHARLES H. HOLDEN ET AL. } No. 4021. Equity.

Know all men by these presents, that we, Charles H. Holden, as prin-

cipal, and Richard M. Hall, surety, are bound unto the above-named plaintiff in the sum of five hundred dollars, to be paid to the said plaintiff, his executors, or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 31st day of July, 1876.

Whereas the above-named Charles H. Holden has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Charles H. Holden shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

CHARLES H. HOLDEN. [SEAL.]
R. M. HALL. [SEAL.]

Sealed and delivered in presence of
WM. A. MELOY.

A. WYLIE.

Approved.

Clerk's certificate.

71

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 29th day of September, 1876.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 267. Charles H. Holden, appellant, vs. The Freedman's Savings and Trust Company et al. Dist. of Col. supreme court. Filed 16th October, 1876.

72

In the supreme court D. C.

THE FREEDMAN'S SAVINGS & TRUST CO. ET AL. *vs.* CHARLES H. HOLDEN ET AL. } Equity. No. 4021.

In the above-entitled cause, which is now by appeal pending before the Supreme Court of the United States, the undersigned plaintiff respectfully informing this court that his answer to the cross-bill of the defendant Holden, which answer was duly filed with the clerk of this court Sept. 2, 1875, and was among the papers of this cause at the hearing before a single justice in November, 1875, and also at the hearing in general term in 1876, cannot, as he is informed by said clerk, now be found, and the same does not appear in the transcript of record of said cause on the files of said appellate court.

Wherefore he moves this court for leave to file the accompanying paper as substantially a copy of said answer, and that when thus allowed and filed the clerk of this court be directed to transmit a copy of
73 said paper with a certificate of such allowance and filing to said appellate court.

THOMAS H. TALBOT.

(Indorsed:) Eq. 4021. Fr. S. & T. Co. & al. vs. C. H. Holden & al. Plff. Talbot moves for leave to file a copy of answer, original having been lost.

74 In the supreme court D. C.

THE FREEDMAN'S SAVINGS & TRUST CO. & AL.
vs.
CHARLES H. HOLDEN & AL. } Equity. No. 4021.

Answer (to supply the place of the original, which cannot be found) of plaintiff Talbot to cross-bill of defendant Holden.

And now comes said plaintiff Talbot, in the cause above entitled, and respectfully shows, to wit:

The consideration of the $5,000 note mentioned and set forth in the bill of complaint in said cause was not an usurious loan of about $4,500 or of any other sum. Nor was it a loan made by this plaintiff under the circumstances alleged in said cross-bill. This plaintiff did not delay paying over the amount of said loan until a considerable time subsequent to the date of said note, advancing the money in various sums as
75 the necessity of the defendant demanded; nor did he delay to make said advancement for any other reason. On the contrary, near the date of said note, namely, on the nineteenth day of October, 1870, the plaintiff advanced in one round sum the whole principal of said note, that is, five thousand dollars ($5,000), and at the same paid interest on that sum at the rate fixed in said note for the time which had intervened between the date of said note and said advancement, to wit, six dollars ninety-four cents ($6.94).

This principal he then advanced and this interest he then paid in order that he might be justly entitled to receive the payment of said note according to its tenor, both as to principal and interest.

Accordingly said note is not usurious, nor without consideration for any part whatever of the amount promised to be paid thereby, either of principal or interest; but was and is for valid and full consideration, according to its tenor, as in the plaintiffs' bill of complaint set forth.

Wherefore your plaintiff prays for all the relief sought in his bill, including costs.

THOMAS H. TALBOT.

76 DISTRICT OF MASSACHUSETTS, *ss:*

Thomas H. Talbot, being duly sworn, deposes and says:

I have read the foregoing answer by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those therein stated upon information and belief I believe to be true. Further, the facts therein stated are, to my best recollection and knowledge, the same in substance and effect as those which in the year 1875, soon after the filing of said cross-bill, I stated in answer thereunto, which answer I then subscribed and made oath

unto, and forwarded to my solicitor in the above-entitled cause, T. D. J. Fuller, esq., of the city of Washington, D. C., and which according to the minute on the docket in said cause, as this plaintiff believes, was duly filed with the clerk of this court on Sep. 2 in that year; but which cannot, as this plaintiff is now informed, after diligent search, be found, and does not appear in the transcript of record sent up on appeal to the Supreme Court U. S.

THOMAS H. TALBOT.

77 Subscribed and sworn to before me on this fifteenth day of July, 1878.

[SEAL.] FISHER AMES,
U. S. Commissioner.

(Indorsed:) Eq. 4021. F. S. & T. Co. & al. vs. C. H. Holden & al. Plff. Talbot files copy of answer lost, by consent.

It is hereby stipulated that the foregoing may be filed in the Supreme Court of the U. S. in lieu of the original filed in the supreme court D. C., since lost, and on which issue was there duly joined, with the same force and effect as if the same, with such replication, had been sent up with the record in the cause mentioned.

Oct. 9, 1878.

ENOCH TOTTEN,
For Appellees.
WM. A. MELOY,
Sol'r for Def'd't. H.

78 (Indorsed:) Sup. Court U. S. 1878. Oct. term. No. 267. Charles H. Holden, app't, *vs.* The Freedman's Savings & Trust Company & al. Stipulation of counsel & addition to record. Filed 10th October, 1878.

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SUPREME COURT OF THE UNITED STATES.

No. 47

OCTOBER TERM, 1879.

CHARLES H. HOLDEN, APPELLANT,

vs.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY ET AL.

CERTIORARI AND RETURN.—FILED AUGUST 1, 1879.

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1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the Supreme court of the District of Columbia, greeting:

Whereas in a certain suit in said supreme court between The Freedman's Savings and Trust Company and Thomas H. Talbot, complainants, and Charles H. Holden et al., defendants, which suit was removed to the Supreme Court of the United States by virtue of an appeal taken by Charles H. Holden, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"The transcript does not contain a copy of the trust deed, an appointment under which the bill was brought to obtain. Also the transcript shows that in the original the defendant Chester put in a plea, but said plea nowhere appears in the transcript:"

You, therefore, are hereby commanded that, searching the records and proceedings in said cause, you certify what omissions you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

2 Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court, the ninth day of April, 1878.

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

3 (Indorsed:) 4021. Equity docket 14, F. S. and Trust Company vs. Charles H. Holden, John Chester, Paul and Isabella Eaton. Certiorari in pursuance of suggestion of diminution of record. Filed April 10, 1879. R. J. Meigs, clerk.

4 In the supreme court of the District of Columbia, April 14, 1879.
In equity.

THE FREEDMAN'S SAVINGS AND TRUST COMpany and Thomas Talbot, complainants,
vs.
CHARLES HOLDEN ET AL., DEFENDANTS.
} No. 4021.

To the Supreme Court of the United States:

In obedience to your writ of certiorari in the above-entitled cause, dated the ninth day of April, 187(8), and by command of the justices of the said supreme court of the District of Columbia, I, Return J. Meigs, clerk of said court, hereby certify that, searching the record and proceedings of the said supreme court of the District of Columbia, in said cause, I find that in the record of said cause already certified to the Supreme Court of the United States certain papers constituting part of said record were omitted, of which the following are true and complete copies, to wit:

5 *Plea of John Chester.*

In the supreme court of the District of Columbia.

THE FREEDMAN'S SAVINGS AND TRUST COMpany and Thomas H. Talbot
vs.
CHARLES H. HOLDEN ET AL.
} No. 4021. Eq. Doc. 14.

The plea of John Chester, one of the defendants to the bill of complaint in the above-entitled cause.

This defendant by protestation, not confessing any of the matters and things contained in the complainant's bill to be true in manner and form as the same are alleged therein, for plea to the whole of said bill says that, before the commencement of this suit, to wit, on the day of , A. D. 1875, said complainant, The Freedman's Savings and Trust Company, closed business and went into liquidation, agreeably to the seventh section of an act of Congress of the United States, entitled "An act amending the charter of the Freedman's Saving and Trust Company and for other purposes," approved June 20th, 1874, under which said act John A. J. Creswell, Robert Purvis, and R. H. T. Leipold
6 were selected as commissioners to take charge of the property and effects of said plaintiff, The Freedman's Savings and Trust Company, and were thereby invested with the legal title to the assets, property, and effects of said company, and are the only persons competent to maintain this suit; wherefore this defendant pleads the matters aforesaid in bar of this suit, & craves the judgment of this honorable court whether he ought to make any further answer, and prays to be hence dismissed with his reasonable costs.

JOHN CHESTER.

Personally appeared John Chester, and made oath that he has heard read the foregoing plea by him subscribed, and knows the contents thereof, and that the facts therein stated are true, as he verily believes. Sworn and subscribed before me this 4th day of January, 1875.

[SEAL.] ROBERT V. HUGHES, *J. P.*

7 *Deed of trust. C. H. Holden to Dan. F. Eaton.—Filed Nov. 21st, '74.*

This indenture, made this thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy, between Charles H.

Holden and Fannie E. Holden, his wife, of the city of Washington, in the District of Columbia, of the first part, and David L. Eaton, of the said city of Washington, and District of Columbia, of the second part:

Whereas the said Charles H. Holden is justly indebted unto John B. Wheeler, of the said city of Washington, in the full sum of five thousand dollars, for which he hath passed to him the promissory note of even date with these presents, payable four years after date, with interest thereon at the rate of ten per cent. per annum from date, payable semi-annually, the prompt payment of which said note and semi-annual interest thereon, as they shall severally mature, the said parties hereto of the first part desire to secure by these presents. And the said Charles H. Holden doth hereby agree at his own cost during the continuance of this trust to insure the hereinafter-described premises against damage or destruction by fire in the name and to the satisfaction of said party
8 thereto of the second part, who shall apply whatever he may receive therefrom to the payment of said note and interest, and to pay all taxes on said premises, and on failure so to do, the holder may, but is not bound to, do the same, all which payment shall be secured hereby:

Now, therefore, this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises aforesaid, and further the sum of one dollar in lawful money of the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoff, release, and convey unto the said part' of the second part, his heirs and assigns, all that certain piece or parcel of ground situate and being in said city of Washington, and known and designated on the plats of said city as lot lettered F, in a subdivision of original lots numbered eighteen (18) and nineteen (19), in square number seven hundred and thirty-two (732), said subdivision being duly recorded in the surveyor's office of said city;
9 said lot lettered F hereby conveyed being part of said original lot number nineteen (19), and fronting on south B street, in said city, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law, or in equity, or otherwise however, of the said parties of the first part, of or in, to or out of, the said piece or parcel of ground and premises:

To have and to hold the said piece or parcel of ground, and premises and appurtenances, unto and to the use of the said party of the second part, his heirs & assigns, in and upon the trusts, nevertheless, hereinafter mentioned and declared, that is, in trust, to permit the said Charles H. Holden, his heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof to take, have, and apply to and for his and their sole use and benefit, until default be made in the payment of said note or either of said interests, or any proper cost, charge, commission, half commission, or expense in and about the same.

And upon the full payment of all of said note, and the interest
10 thereon, and all other proper costs, charges, commissions, half commissions, and expenses, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said Charles H. Holden, his heirs or assigns, at his or their cost.

And upon this further trust, that upon default being made in the payment of the said note, or any one of said semi-annual interest thereon, or any proper cost, charge, commission, half commission, or expense in

and about the same, then and at any time thereafter to sell the said piece or parcel of ground and premises at public auction, upon such terms and conditions, and at such time and place, and after such previous public advertisement as the said party of the second part, or his heirs, or the trustee acting in the execution of this trust, shall deem advantageous and proper; and to convey the same in fee-simple to and at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase-money and of the proceeds of said sale or sales; first to pay all proper costs, charges, and expenses, and to retain as compensation a commission of five per cent. on the amount of the said sale or sales; secondly to pay whatever may then remain unpaid of the said note and the interest thereon, whether the same shall be due or not; and lastly to pay the remainder, if any, to said Charles H. Holden, his executors, administrators, or assigns.

In testimony whereof the said party of the first part have hereunto set their hands and seals on the day and year first hereinbefore mentioned.

C. H. HOLDEN. [SEAL.]
FANNIE E. HOLDEN. [SEAL.]

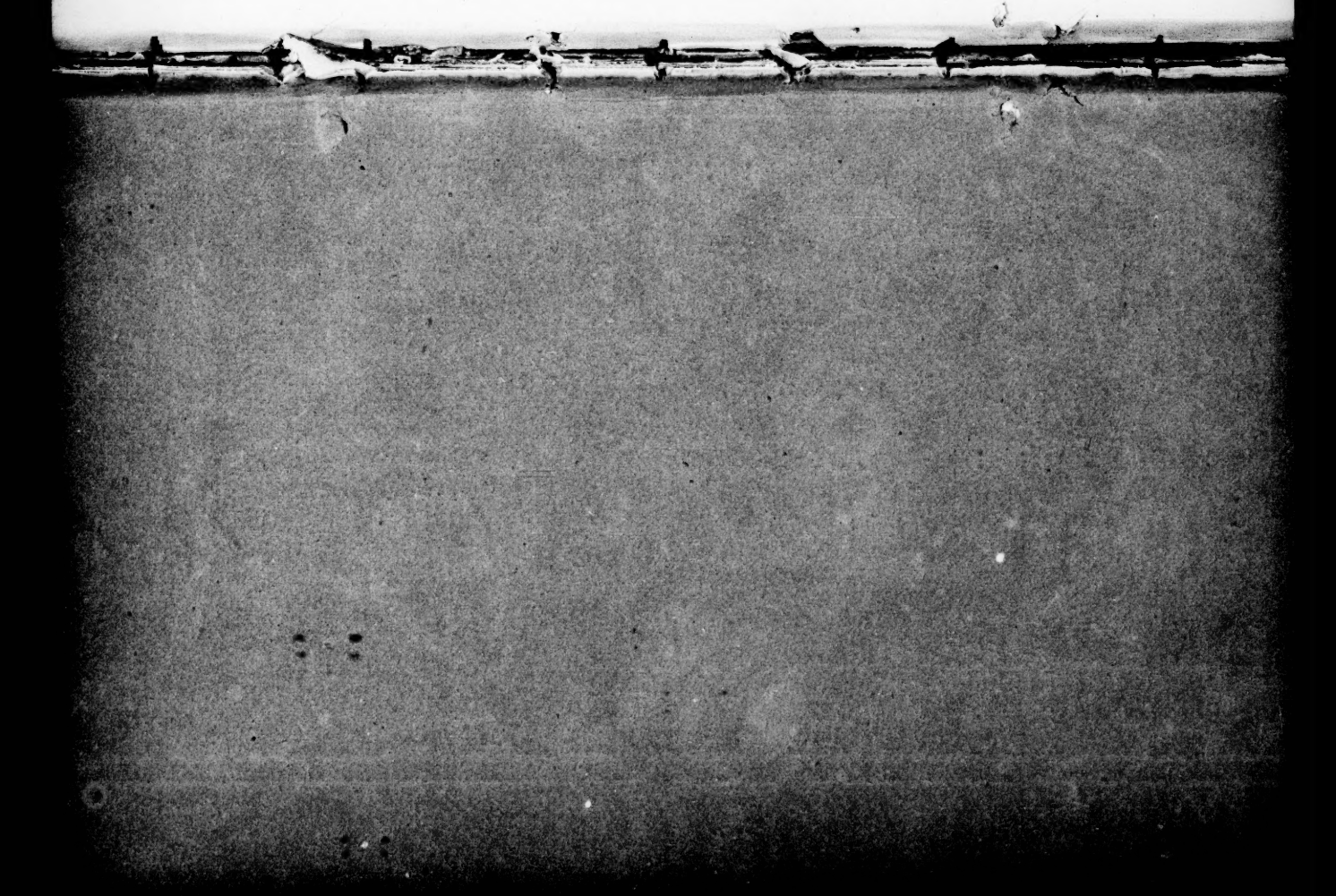
Signed, sealed, and delivered in the presence of—
AMOS HUNT.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Amos Hunt, a justice of the peace in for the county aforesaid, in the said District, do hereby certify that Charles H. Holden and Fannie E. Holden, his wife, parties to a certain deed, bearing date on the 13th day of October, A. D. 1870, and hereto annexed, personally appeared before me in the county aforesaid the said Charles H. Holden and Holden, his wife, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Holden, wife of the said Charles H. Holden, being by me examined privately and apart from her said husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and seal this day of October, A. D. 1870.
AMOS HUNT, *J. P.* [SEAL.]

(Indorsed:) Supreme Court U. S. 1879, October term. No. 47 Charles H. Holden, app't, vs. The Freedman's Savings & Trust Com pany et al. Certiorari & return. Filed 1st August, 1879.



Supreme Court of the United States.

No. 47.—October Term, 1879.

CHARLES H. HOLDEN, Appellant,

vs.

THE FREEDMEN'S SAVINGS AND TRUST COMPANY et al., Res.

Brief for Appellant.

I.

Abstract of Pleadings and Proofs.

1st. *Pleadings.*

The bill in this cause was filed November 18, 1874, in the name of the Freedmen's Savings and Trust Company and T. H. Talbot, alleging that on the 13th of October, 1870, Holden made a note for $5,000, payable, with 10 per cent. interest, four years from that date, which note was subsequently indorsed and delivered to Talbot for value.

That to secure this note Holden made a deed of trust upon certain premises to one George L. Stickney.

That Eaton, the trustee in said deed, died February 13, 1873, leaving as his lawful heirs two minor children, made defendants.

That Talbot indorsed the note to the Freedmen's Savings and Trust Company July 24, 1872, as security for a loan of $1,500.

Trust Company; is the custodian of the Holden note; produces it from the "Commissioners," and for them.

On cross-examination: Entered the employ of the Commissioners—John A. J. Creswell, R. H. T. Leipold, and Robert Purvis—as soon as they qualified, came there and took possession of these notes, &c., which was July 11 or 13, 1874; was previously loan clerk in the employ of the Freedmen's Savings and Trust Company about four years; have the same duties now with these Commissioners who succeeded the bank, and am their custodian of this note; the pencil indorsement on back of the note is in my handwriting; it reads, "Received Nov. 25, 1872, $250."

John B. Wheeler testified that the note was drawn by by Havenner to witness' order for convenience of negotiation, indorsed by witness without consideration, and delivered to Havenner to raise money on.

Stickney, recalled, says the indorsements on the back of "Exhibit T. D. A. No. 1" represent correctly all payments made, except that $75 was also paid on account of interest accruing after April 13, 1873. Plaintiff Talbot stated to witness that the Holden note did not belong to him entirely; (p. 23;) a part belonged to his *sister-in-law* and a part to one *Mary Powers.*

The evidence thus adduced by plaintiffs alone was then summarily returned into court, and the cause pressed to immediate hearing, notwithstanding that the evidence neither of defense nor for cross-bill had been taken; and, notwithstanding defendant's motion for time, &c., (Record, p. 24,) the court insisted on determining the cause without any evidence for defendants, and so did, making its decree, (p. 25,)—

That Holden was indebted to Talbot in the sum of $5,000, bearing 10 per cent. interest from the 13th day of April, 1873, less $75 to be deducted from interest.

That the Freedmen's Savings and Trust Company has

a lien on such indebtedness for $1,500, and interest from 13th April, 1875.

That T. J. D. Fuller be appointed trustee in place of Eaton, deceased.

And this decree, in the absence of defendant's counsel, was affirmed by the court in General Term.

II.

Statement of Errors.

(*a*) The court erred in its allowance of interest, to the amount of exactly $1,000, this 13th day of October, 1879.

(*b*) The court erred in refusing to strike the cause from the trial calendar and give defendants opportunity to take their evidence in defense, and on the cross-bill, as duly and seasonably prayed by them. (Record, pp. 24, 25.)

Eq. R., S. C. of D. C., adopted 22d June, 1875, Nos. 63 and 65.

(*c*) The court erred in not dismissing the bill, under Equity Rule 38, when the plaintiff's own evidence disclosed that the proper parties plaintiff were not before the court, notwithstanding defendants' objection on that account.

(*d*) The court erred in overruling the defendants' plea that Creswell, Purvis, and Leipold were holders of the note, and not the defunct Freedmen's Savings and Trust Company.

(*a*) The written contract of Holden was an agreement to pay the rate of ten per cent. interest up to the 13th day of October, 1874, and no longer. Had Holden been allowed to put in his evidence, and thereby had established the fact of usury as claimed by him, no interest whatever would

have accrued upon the note, either before or after its maturity; and though, deprived of all his evidence, he failed in proof of usury, still no interest would have accrued on the note after its maturity, except by virtue of that statute law which gives six per cent. interest upon the forbearance of money. Ten per cent. interest rests solely upon written agreement, and here was none, written or parol, with respect to interest for forbearance after maturity. The note is set forth *verbatim* in our brief, not having been originally returned by the court below. See stipulation filed October 4, 1879.

The question is *res adjudicata* in this court.

Brewster *v.* Wakefield, 22 How., 118.
Burnhisal *v.* Firman, 22 Wall., 170.
Macomber *v.* Dunham, 8 Wend., 553.
United States Bank *v.* Chapin, 9 Wend., 471.
Ludwick *v.* Huntzinger, 5 W. & S., 60.

(*b*) The defendant Holden, without any error, laches, or impropriety on his part, was, by the court's summary seizure and trial of the cause, in disregard of its own rules, deprived of the opportunity of putting in his evidence, and his cross-bill was thus made entirely nugatory. (See Record, p. 24.)

Equity Rule 63 of the Supreme Court of the District of Columbia, adopted June 22, 1875, is as follows:

"63.—*Manner of setting causes for hearing and placing same on calendar.*

"No cause in equity shall be set down for hearing unless the same be at issue *and ready for hearing*, or be properly set down for hearing on bill and answer, or bill, answer, and replication, and every such cause may be ordered by either party or his counsel, to be placed upon the calendar, provided such order be given at least five days previous to the first day of the next special term."

Equity Rule 65 of that court is the same as this court's amendment of Rule 67, at December Term, 1869, viz.:

"65.—*Time for Taking.*

"Where the evidence to be adduced in a cause is to be taken orally, as provided in Rule No. 64, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply, and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion, for cause shown."

Beyond the provisions of these two rules, there is in the Supreme Court of the District of Columbia no limitation of the time within which a party shall conclude the taking of his evidence; no mode of bringing the cause to trial except by agreement of the parties.

The true construction of the rules is, that a cause cannot, in the absence of agreement of the parties, be put upon the trial calendar until the evidence on both sides has been taken, returned into court, and there duly published by the clerk, unless the party desiring to hasten the trial shall first move the court, with due notice to his adversary, to fix by its order the limit of time in the prospective within which the evidence shall be taken.

The practical operation of such a rule is perfectly equitable, fair, and easy; in no way subject to objection. The defendant had a perfect right to rely upon it, especially as he was making then a necessarily preliminary motion which the court held well founded, (p. 25,) and yet the justice holding the trial term utterly disregarded the rule.

(*c*) The plaintiff's own evidence showed that the real owners of the Holden note were not before the court. The note was in the possession of and produced by John A.

J. Creswell, Robert Purvis, and R. H. T. Leipold, Commissioners, who, before the filing of the bill, had been duly selected, appointed, bonded, qualified, and *vested with full title* under the act of Congress of June 20, 1874, ch. 349.

It proved, too, that instead of Talbot having a reversionary interest, remainder, or equity of redemption in the note, this belonged to his sister-in-law and to one Mary Powers. (P. 6, sec. 8, and p. 23.)

Of what avail, then, would it have been to us to prove the usury, and get leave to discharge the debt by payment of the amount actually advanced on the note, without any interest, and after deducting the sums admittedly paid, if after all the decree would not have bound the real owners and holders of the note—none of whom were in court?

The plea of defendant was well taken, and should have been sustained. (P. 3.)

If the late "Freedmen's Savings and Trust Company," shameful *lucus a non lucendo*, ever held this note, all its right, title, and interest had, by the joint action of Congress and of the last trustees of the institution, been transferred absolutely and vested in these three Commissioners. Had they stood merely in the position of judicially-appointed receivers of the property, the cases show they would have full power to bring this suit in their own name, though very likely in the name of the company as well, for the position of such a receiver is that of hand to the court, and the court thus takes hold upon the assets as agent for whoever may be interested, and the agent in possession may bring suit in his own name, or in that of his principal.

But these Commissioners, under the law, are not receivers or mere agents: they are full transferees of title. The title is vested in them—the legal title. What, then, can remain of title or power in the ghost which haunts us with its name only, and the memory of great trusts wantonly betrayed?

Since the Special Term overruled this plea, that court has

itself sustained the construction here first given to this law. (2 MacArthur, 246.)

The intimations of this court (rather *ex obiter* than in the line of necessary decision) in certain suits brought by receivers of national banks, that, though of the capacity themselves, they might, nevertheless, have brought suit in the corporate name of the association, are not applicable to this case. The receiver of a national bank is not "vested with the legal title."

See Kennedy *v.* Gibson, 8 Wall., 498.
Bank of Bethel *v.* Pahquioque Bank, 14 Wall., 400.
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Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 267. OCTOBER TERM, 1878.

" 47. " 1879.

CHARLES H. HOLDEN, *Appellant*,

v.

THE FREEDMAN'S SAVINGS AND TRUST COMPANY ET AL.

BRIEF FOR THE APPELLEES.

STATEMENT OF FACTS.

IN October, 1870, the appellant Holden made a deed — which was recorded according to law — of the premises named in the original bill, — a dwelling-house and land in this city, — conveying the same to one D. L. Eaton in trust, to secure the payment to the appellee Talbot of a note, dated Oct. 13, for five thousand dollars, payable in four years, with interest semi-annually at the rate of ten per cent per annum. This interest was paid in full to April 13, 1873: and, save seventy-five dollars, none accruing since has been paid; neither any part of the principal, all of which became payable Oct. 13, 1874 (pp. 1 and 2).

Feb. 13, 1873, the trustee Eaton deceased; and in 1874 (the beforementioned note being then, both as to interest and principal, overdue) the appellee Talbot brought a bill in equity in the Supreme Court of this district for the appointment of a new trustee in his place, and for other and further relief (pp. 1 and 2). The bill alleges Holden's insolvency (p. 2), and the answer does not deny it (p. 6).

Previous to this, the above note had been pledged by Talbot to the appellee Trust Company to secure a loan made to him, about which matter there is no dispute between the two appellees; so that

its particulars need not be stated in this brief, this statement being sufficient to account for the appearance of the Trust Company as a party in this case (p. 1).

Also, previous to this (that is, in 1871) Holden had conveyed the Trust premises to the other original defendant, Chester, who at once took possession of those premises as his, and has held them ever since, taking, as it were, the rents and profits to himself (p. 2). Thus, said Chester was necessarily made a party to this bill. He appeared and answered; and his answer was not a disclaimer.

Nov. 4, 1875, in special term, a decree was made in favor of the plaintiffs; and afterwards (June 12, 1876) the same was affirmed in general term on appeal.

And thereafter, by further appeal of the defendant Holden, this case was brought here.

Until some argument has been offered in support of this appeal, the counsel for the appellees does not feel called upon to offer any thing in support of the decree appealed from.

In the present stage, he feels at liberty, assuming that that decree will be affirmed, to present the equitable necessity existing in this case that this court should, in that event, enlarge the remedy to be decreed to the appellees beyond that decreed by the court below. In support of this point, the duty of opening, as well as the privilege of closing, may well devolve upon this appellee, who, in thus opening, submits the following

ARGUMENT.

The prayer in the original bill for general relief makes the pleadings broad enough to cover any relief which the evidence before the court shows to be necessary.

Whatever relief the pleadings include, and the evidence supports, "whatever the nature of the case requires," is completely within the jurisdiction of an appellate court in an equity case. Catlin *v.* Heaton, 9 Wis., 476; Calton *v.* Wyld, 32 Beau., 266; Franklin *v.* Greene, 2 Allen (Mass.), 519 (524); Mitchell *v.* Moore, 95 U.S., 587 (591).

Especially should the appellate court grant additional relief when the necessity for such relief arises from a delay occasioned by the appeal, as in this case.

I.

The plaintiffs were compelled to institute this proceeding. The default of the debtor had become complete before the bringing of this bill, and has continued to this time. No other step towards enforcing this trust could be taken before that of procuring a trustee to be appointed to the vacancy made by death. This equitable object sought by the plaintiffs the defendants have inequitably resisted. Accordingly, they should be required to pay, over and above taxable costs, the expenses incurred by the plaintiffs in this suit, including counsel fees. Hurd *v.* Coleman, 42 Maine, 182 (191); Welsh *v.* Durand, 36 Conn., 184.

For reasons hereafter appearing, this portion of the decree should be *in personam*, if the *res* fails to satisfy this with other claims upon it.

II.

The defendant Chester, during the whole continuance of this suit, which seeks the appointment of a trustee, has remained tenant in possession of the trust premises, taking, in the eye of the law, the rents and profits to himself. This he has done with full knowledge of the existence and terms of the trust; the trust deed being recorded according to law.

He has been meddling with, converting to his own use, trust property, knowing it to be such. Thus, he has made himself a trustee of these premises under the trust deed, and must account, as such, for all that he has received therefrom.

Thaxter *v.* Bradley, 16 Maine, 376 (389); Gore *v.* Jenness, 19 Maine, 53 (55); Wright *v.* Dame, 22 Pick., 55 (60); Pinch *v.* Anthony, 8 Allen (Mass.), 536 (538); Felch *v.* Hooper, 119 Mass., 52 (57); Bank of Utica *v.* Finch, 3 Barb., Ch. 293 (303); Murray *v.* Bullon, 1 Johns., Ch. 565 (573); Shepherd *v.* McEvers, 4 Johns., Ch. 136 (137); Bush *v.* Bush, 1 Strobhart, Eq. (So. Car.), 377 (379); Legard *v.* Hodges, 1 Vesey, Jr., 477; Roundell & Ux. *v.* Breary, 2 Vern., 482; Wellesley *v.* Wellesley, Cowp. Cases in Chan., 561; Dormen *v.* Fortescue, 3 Atk., 129; Coventry *v.* Hall, 2 Ch., Rep. 259; Pulteney *v.* Warren, 6 Vesey, 88 (92); Green *v.* Biddle, 8 Wheat., 1.

Not only equity, but law, — the common law, — recognizes and en-

forces this plain principle of justice. After the demandant in a writ of entry had obtained possession of the premises, he might bring an action of trespass for rents and profits accruing from the first occupation of the tenant; for the judgment upon the writ of entry would have ascertained that his possession from his first entry had been wrongful. (Later statutes allow the demand for rents to be sued in the writ of entry itself, while equity has always endeavored to secure complete justice in a single proceeding so far as practicable.) Emerson *v.* Thompson, 2 Pick., 474 (490); Larrabee *v.* Larrabee, 36 Maine, 440 (444, 446); Drexel *v.* Man, 2 Barr (Penn.), 271; Lessee of Brown *v.* Galloway, Peters's C. C. Reports, 292.

In the present case the plaintiffs have taken the proper steps towards making these premises available for the purposes of the trust. They have brought an equitable writ of entry. In contemplation of this court, they must be treated as entitled to possession at latest from the bringing of their bill; and what ought then to have been done, the court should now make as though it had been done.

"A bill by an equitable incumbrancer is equitable possession." Parker *v.* Calcraft, 6, Madd., 11.

The plaintiffs are equitable incumbrancers. They have not the legal right of possession, it is true. For this very reason they are entitled to the aid of a court of equity. The English practice of appointing receivers rests upon that point. It is the second mortgagee alone (who, as against the first, has not the right of possession) upon whose application the English courts appoint a receiver. Colman *v.* the Duke of St. Albans, 3 Vesey, 25 (32); Berney *v.* Sewall, 1 Jacobs & Walker, 627.

III.

This case presents special reasons why the foregoing principles of law should be enforced against these defendants; for not only do they have no equitable defence against this proceeding, but also they do not succeed in even alleging a colorable defence.

The answer of the defendant Holden admits that he received, as consideration of the note in this case, the sum of $4,000 (p. 6); and his cross-bill carries the amount thus received to $4,500 (p. 7). He alleges no payment made by him beyond what had been stated in the plaintiffs' bill.

Upon bill, answer, and cross-bill, then, there was a large sum due

to the plaintiffs; and, to enable them to collect that sum, they were entitled, in 1874, to the appointment of a new trustee. While a dollar remained due on that note, the trustee should have been appointed; and here, as an admitted fact, thousands of dollars were overdue.

Yet the defendants have for years prevented this appointment; have meanwhile taken to themselves the rents and profits of the trust property, and kept the plaintiff out of the receipt of any portion of what was due to him.

IV.

This is the aspect of the defence as formally alleged, as pleaded, one might say. But an answer or cross-bill in equity may contain something more than mere formal allegations. It often would go on to state facts and circumstances in support of such pleadings; and so it is in this case.

The formal allegation is of a usurious contract. How are its particulars and circumstances set forth?

The defendant Holden states that the note in this case was delivered, in the answer, to one Wheeler (p. 6); in the cross-bill (p. 7), to one Havenner, — to be negotiated. He states no connection between either of these persons and the plaintiff Talbot; and he makes no statement reaching beyond these persons respectively, — his own agents. On the other hand, in his answer, he expressly says, that, beyond Wheeler, he knows nothing of the passage of said note (p. 6).

In the answer he complains that he received only $4,000; in the cross-bill, $4,500. Received from whom? Not from the plaintiff Talbot; for neither answer nor cross-bill pretends to know him.

The defendant Holden, then, can state no usury upon the plaintiff Talbot; for he knows none: and his attempt twice to make such a charge is, upon his own showing, scandalous.

This matter twice put into the case by the defendant touches his co-defendant Chester, who avails himself of this scandal to keep possession of the premises charged with a trust for the benefit of the plaintiff.

That those premises were thus charged, Chester knew from the

forces this plain principle of justice. After the demandant in a writ of entry had obtained possession of the premises, he might bring an action of trespass for rents and profits accruing from the first occupation of the tenant; for the judgment upon the writ of entry would have ascertained that his possession from his first entry had been wrongful. (Later statutes allow the demand for rents to be sued in the writ of entry itself, while equity has always endeavored to secure complete justice in a single proceeding so far as practicable.) Emerson *v.* Thompson, 2 Pick., 474 (490); Larrabee *v.* Larrabee, 36 Maine, 440 (444, 446); Drexel *v.* Man, 2 Barr (Penn.), 271; Lessee of Brown *v.* Galloway, Peters's C. C. Reports, 292.

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That those premises were thus charged, Chester knew from the

registry of the trust deed; and that deed was, until otherwise shown, to be taken as given for adequate consideration. Chester was not at liberty to presume it fraudulent in whole or part.

Of parol information in relation to it, his first source was the mind and memory of his grantor, Holden. He was bound to inquire of him, at latest, as soon as any proceeding was initiated against himself to enforce the conveyance made by this trust deed. When he inquired, what did he learn? What could he learn?

At best, for Holden and Chester, what Holden has stated in court? — "The note (Holden must have told him) is good for about $4,500, and, for all that I know, may be good to its holder for the whole amount."

V.

There was then but one way in which these defendants could put themselves right in this case, — that was to offer to pay the amount due on the note, or to allow the premises to go at once to a trustee. They should have paid or disclaimed, making the disclaimer good by yielding possession.

They did neither. They did not even offer to pay the amount admitted to be due. They stood upon an inadequate and even scandalous defence, and kept Chester in enjoyment of the premises, to which he had no equitable claim as against this trust.

VI.

Thus much for Holden's own statement of the case. But this part of the case does not end with Holden's statement. He calls the complainant to answer the "cross-bill under oath," though not an allegation therein touches that complainant (p. 8).

And the complainant answers accordingly. He explicitly denies all usury and all delay; and testifies that the money was paid for the note — the whole face of the note — in one round sum, speedily after the date of the note, and interest paid to the maker of the note for the intervening time (p. 28).

This uncontradicted statement stands as the fact of this matter. Further, this statement is corroborated by the testimony of Stickney, who knew of the payment of the whole amount, and of its appropriation for Holden's benefit (pp. 11, 19, 20; also p. 17).

VII.

Chester, with full knowledge of this true state of the case (including Holden's default and insolvency), has continued to defend and to avail himself of Holden's defence to hold these premises.

Can a court of equity do otherwise than compel him to pay the plaintiff for such holding; to put, by such payment, the plaintiff in possession of these premises from the time when the rents and profits thereof first became necessary to the execution of this trust, — that is, when the interest due to the *cestui* began to be in default?

This additional relief is made necessary by the delay which this appeal has interposed. In the three years and more since the decree appealed from was made (Nov. 4, 1875), interest has accrued at the rate of five hundred dollars per year. The premises have been held by a tenant who had no interest to keep them in good condition; and, as the members of the court well know, the market value of real estate has greatly diminished.

That these rents and profits, and a still larger supplement, will be needed towards the payment of this debt, unhappily there is no room for doubt. If it should, *by miracle*, prove otherwise, then the order to account of course loses its force.

VIII.

But an account of rents and profits in this case will not satisfy the demands of equity. There is little probability that it will compensate the plaintiff for his actual loss, occasioned by the holding from him of these premises.

In accounting, the tenant in possession would undoubtedly endeavor to show that a lower rate of rent ought to be charged against him for the later than for the earlier years of his inequitable holding, and might in this endeavor be successful. Now, the right of the plaintiff was to turn these premises into money at the beginning of this holding, when their annual rental was comparatively high; while the resistance of the tenant will compel him to put them at vendue when their rental will be low.

This depreciation of the property by the change of times, and by negligence and waste (a tenant in possession not confident enough of holding as his, to keep down the taxes), must be contemplated and provided for in the final decree.

IX.

Furthermore, the conduct in this suit of both defendants, — Chester as well as Holden, — as already noticed, has been such as to make them proper subjects for the application of the rule of exemplary damages. They have acted with "a wanton, wilful, reckless disregard of the rights of the plaintiff." This is sufficient ground on which to raise exemplary damages. Express malice need not be shown. Farwell *v.* Warren, 51 Ill., 467; Jameson *v.* Moor, 43 Miss., 598; Briscoe *v.* Elween, 43 Miss., 556. The injury need not even be intentional. Welch *v.* Durand, 36 Conn., 184.

Such damages are given in real as well as personal actions; and this is a real action in equity. Perkins *v.* Towle, 43 N. H., 220, and cases there cited. Even in an action between mortgagor and mortgagee. Mickie *v.* McGehee, 27 Texas, 134.

The proper measure of these damages is that fixed by the twenty-third rule of this court in cases where an appeal is taken merely for delay. The injury done here is of the nature and extent there provided against. See Addenda.

This conduct of the defendants furnishes ample reason, also, why they should be held personally liable to pay the costs and expenses of this litigation, as before suggested in this brief.

Thomas H. Talbot,

Appellee & Counsel.

ADDENDA.

I. on p. 3.

"But the expenses" (considered as between attorney and client) "incurred in the Court of Errors were part of the damages sustained by the plaintiff, by reason of his having been wrongfully kept out of the possession by the act of the defendant." Lord Tenterden in Nowell *v.* Roake, 7 Barn. & Cress., 404.

VII. on p. 7.

After that default, his right, as Holden's assign, to occupy the premises, ceased. See trust deed in return to writ of certiorari, not in the transcript when the brief was printed.

IX. on p. 8.

True, equity does not know *vindictive damages* as such. Neither, perhaps, does admiralty. But admiralty knows — and so ought equity — how to reach the result which in this case can be reached only by something somewhat resembling exemplary damages, as the following extract from an opinion of Judge Sprague will show: —

"Now, although I reject the doctrine of punitive or exemplary damages, yet care should be taken that full indemnity is given. If substantial doubts exist, they must operate against the wrong-doers." Sprague's Decisions, 323.

But the appellees in this case need not rely upon the rule which allows punitive damages. The law of real actions sanctions the remedy now sought. In the eye of equity, this tenant is like unto a disseizor in retaining his possession. He is no better than a tenant at sufferance. Such a tenant is held at common law to make good all the damages which any of his acts as tenant have caused; for his holding and all his acts as holder are unlawful.

"He had no right to build a fire upon the premises; and, if misfortune resulted, he must bear the loss." Russell *v.* Fabyan, 34 N.H., 219 (225).

See also Moore *v.* Davis, 49 N.H., 45 (56); also Dewey *v.* Osborne, 4 Cowen, 329 (338).

"I have known four times the value of the mesne profits given by the jury in this sort of action. If it were not to be so sometimes, compleat justice could not be done to the party injured." Gould, J., in Goodtitle *v.* Tombs, 3 Wils. 118 (121).

If, at this stage, and in this court, where new evidence is not admissible, it is now doubtful how much damage has been done — especially pending this appeal — by the inequitable detainer of these premises, that doubt must, as Judge Sprague has declared, operate against the tenant as the wrong-doer. It is incumbent upon this high court of chancery not to dispose of this case without putting it in the power of the complainants to obtain, in the language of that same just judge, full indemnity. Allison *v.* Chandler, 11 Mich. 542 (553–556; also 561, 562).

That the *supersedeas* bond in this case may have been, for all preliminary purposes, deemed sufficient, merely upon the approval of the judge below, can scarcely be a reason why, upon this final hearing, this court should not consider whether it affords any security to the appellees. The appeal has now pended more than *three years*, while the penalty of the bond was equal only to the interest promised upon the debt for *one year;* and evidence uncontradicted has been before this court tending to show the irresponsibility of the surety, while the case finds the principal insolvent. It is practically worthless to the appellees.

The appellant, Holden, this brief further submits, has no interest in questions raised herein touching the liability merely of Chester, and in relations to such questions is not entitled to be heard.

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